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No. 96-1400

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF COLUMBUS-AMERICA DISCOVERY GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COLUMBUS-AMERICA DISCOVERY GROUP IN SUPPORT OF THE PETITION

Columbus-America Discovery Group hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioners has consented to the filing of this brief; counsel for the Respondent has refused consent.

As noted in the decision below, Columbus-America Discovery Group is a multidisciplinary team of historians, engineers, scientists, and entrepreneurs dedicated to

exploring the deep ocean. Appendix to Petition for Writ of Certiorari A3. After performing historical research for more than a decade and searching an area the size of Rhode Island, Columbus-America located the SS *Central America*, a legendary Gold Rush steamship that sank in 1857 at a depth of 1½ miles, approximately 180 miles east of Charleston, South Carolina. The SS *Central America* was laden with gold and also carried approximately 600 passengers and crew members during its last voyage, yet only 153 of them lived to tell about how the once proud steamship succumbed to the fury of a tropical hurricane.

Since its discovery of the SS *Central America*, Columbus-America has used its robot -- *Nemo* -- to recover gold ingots and coins, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*. For instance, the Group has produced two educational packages (in interactive laser-video disc format) for secondary schools, published a book on the history of the shipwreck, and created museum and zoo exhibits and other materials of interest to both the general public and the scientific community. Columbus-America has also supported an international Adjunct Science and Education Program, whose more than 100 participants from universities, museums, and research laboratories in this country and abroad have discovered a dozen new species of marine life and have researched such diverse areas as deep-sea site degradation mechanics and food chain processes.

The Group's accomplishments have been highlighted in numerous articles, including the March, 1992 *Life* article "The Greatest Treasure Ever Found" and the March, 1995 *Reader's Digest* article "Quest for the Ship of Gold."

Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992, at 32; *Quest for the Ship of Gold*, Reader's Digest, March 1995, at 202. The Group's qualities have also been described by various courts as follows:

- "What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination."

  Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al., 56 F.3d 556, 576 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged."

  Id. at 572.

- "Selection of the personnel to assist was from those most highly qualified and experienced in the contemplated activities. The same criteria was used in selecting the experts who were to evaluate, handle, care for and preserve the artifacts, scientific materials, information and knowledge obtained from the operation, and to preserve and make it available for future use by the public in research and learning."

  Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel, Civ. A. No. 87-363-N, 1993 WL 580900, *6 (E.D. Va. Nov. 18, 1993), *aff'd*, 56 F.3d 556 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "From the inception of the project, [Columbus-America] had assembled experts in the various fields of science, archeology, history, maritime, marketing and publicity, to advise and assist in the use, care and preservation of the shipwreck site....It is sufficient to say that they are the leaders in their field[s] of science and calling."

Id. at *9.

Columbus-America does not have any affiliation whatever, financial or otherwise, with any of the parties in this case. It likewise does not have any monetary interest in the outcome of this matter. Columbus-America does, however, bring a unique perspective to this case because the issue of the legal presumptions regarding title to sunken merchant shipwrecks is a fundamental, purely legal, issue that is of paramount importance to scientists, entrepreneurs, and explorers who work not only in the United States, but also around the globe. Having found "an exceedingly small needle in a dauntingly large haystack" in international waters almost 200 miles off the eastern seaboard, *Columbus-America*, 56 F.3d at 572, Columbus-America offers an international vantage point that may help inform the Court's decision.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition.

Respectfully submitted,

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COLUMBUS-AMERICA DISCOVERY GROUP'S BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF THE AMICUS CURIAE

On September 8, 1857, the luxury sidewheel steamer known as the SS *Central America* departed from the port in Havana headed for New York. On board were approximately 600 crew members and passengers from San Francisco and several tons of gold coins and bars produced during the Gold Rush and its entrepreneurial

aftermath.

Everyone on the SS *Central America* was headed straight into history, for soon after leaving Havana, the steamship sailed into the middle of a tropical hurricane. Despite valiant efforts to survive the storm, the ship went down on September 12, 1857, in roughly 8,000 feet of water, some 180 miles east of Charleston, South Carolina.

Approximately 130 years after this famous maritime disaster, Columbus-America Discovery Group's multidisciplinary team of historians, engineers, scientists, and entrepreneurs discovered the SS *Central America*. Since its discovery of the sidewheel steamship, Columbus-America has used its robot -- *Nemo* -- to recover gold, passenger trunks, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*.

The Group's accomplishments have not gone unnoticed. They have received a great deal of attention from the admiralty bar and beyond, and the Fourth Circuit bestowed the following accolade on Columbus-America two years ago: "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 56 F.3d 556, 572, *cert. denied*, 116 S. Ct. 352 (1995).

Columbus-America submits this brief in the hope that it will assist the Court in addressing a fundamental legal issue that is of paramount importance to scientists,

entrepreneurs, and explorers around the world. The issue pertains to the legal presumptions of title applicable to sunken merchant shipwrecks, and its resolution by the Court will help determine the future of exploration on the earth's last frontier.

STATEMENT OF THE CASE

As noted in the petition for a writ of certiorari, this case began when Deep Sea Research, Inc. filed an *in rem* complaint in admiralty against *The Brother Jonathan*, seeking possessory rights and confirmation of title to the entire sunken merchant vessel under the law of finds, or alternatively, a salvage award under the law of salvage. The State of California intervened and moved to dismiss the case for lack of jurisdiction on the grounds that (i) the State had a "colorable interest" in the shipwreck, and (ii) Deep Sea Research's action was thus a suit against the State prohibited by the Eleventh Amendment to the United States Constitution. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") A22-A23. The United States intervened when Deep Sea Research challenged the constitutionality of one basis for the State's interest -- the Abandoned Shipwreck Act of 1987 (the "A.S.A."), 43 U.S.C. §§ 2101-2106 (1988). Pet. App. A23 n.2.

The district court concluded that the *Brother Jonathan* was not abandoned and accordingly denied the State's motion to dismiss, while granting Deep Sea Research's request to be appointed as the exclusive salvor of the shipwreck. *Id.* at A57-A58. On appeal, the Ninth Circuit affirmed, holding in a unanimous decision that the traditional maritime rule that the abandonment of merchant shipwrecks can be inferred from all of the

relevant facts and circumstances should continue to be applied. Pet. App. A15-A17. The court below thus rejected the Fourth Circuit's theory that abandonment can be proved only by "clear and convincing evidence" of an "express abandonment." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 974 F.2d 450, 461, 464 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

The Ninth Circuit concluded that because the district court had declined to apply the Fourth Circuit's abandonment test, and had instead applied well-settled maritime law, it had not erred:

> Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners.

Id. at A15-A16 (emphasis added). With respect to the Fourth Circuit's decision, the Ninth Circuit succinctly observed that:

> [i]n holding that abandonment could only be found on the basis of an express renunciation of ownership, the Fourth Circuit introduced a significant modification into maritime law.

Id. at A15 (citing *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting)).

Applying the inferred abandonment rule, the court of appeals agreed that the *Brother Jonathan* was not abandoned. The State of California urged that, based upon the Fourth Circuit's decision in *Columbus-America*, the salvor was entitled to only that portion of the *Brother Jonathan* which it could prove was not abandoned; once the court below determined that part of the cargo had not been abandoned, however, it declined to divide the defendant *res* into "abandoned" and "unabandoned" portions. Pet. App. A17-A19. Noting that doing so would likely be contrary to Congress' intent under the A.S.A., the court also expressly rejected the Fourth Circuit's approach to the *in rem* presumption and pointed out the clear conflict:

> [S]uch an approach is inconsistent with the general rule in maritime law of treating wrecks as a legally unified res. In fact, the Fourth Circuit's decision in Columbus-America appears to be the only admiralty case in which a wreck has not been treated as a legally unified whole.

Id. at A18. The court below accordingly found that the shipwreck should be treated as unabandoned and owned in its entirety by the *in rem* plaintiff, due to the lack of proof of superior title. *Id.* at A18-A19.

REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address the significant legal and practical consequences of the split among the federal circuits concerning the presumptions applicable to maritime exploration and recovery. In applying a presumption that, absent proof to the contrary,

the *Brother Jonathan* should be treated as a unified whole, the opinion below directly conflicts with two automatic presumptions applied by the Fourth Circuit: (i) a presumption in *in rem* proceedings that property interests in the defendant *res* are automatically divided into interests in the hull, tackle, apparel and appurtenances on the one hand, and cargo and passenger effects on the other hand, and (ii) a presumption that any items recovered do not belong to the *in rem* plaintiff.

Given the importance of the *res* involved, *see* Q. David Bowers, *American Coin Treasures and Hoards* 254-63 (1997), and the attention this matter has received from the public and the admiralty bar, the Court's action here is certain to have critical effects on the emerging industry of high-technology maritime recovery. The disposition of this case also has important implications for state and federal management of historic shipwrecks under statutes governing "abandoned" maritime property. In short, this case is an appropriate vehicle for resolving a nationally and internationally important maritime issue.

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ADMIRALTY PRESUMPTIONS REGARDING PROPERTY INTERESTS IN *IN REM* PROCEEDINGS.

A. Federal Circuits are in Direct Conflict as to the Presumptions Regarding the Unity of Property Interests in a Defendant *Res*.

As noted in the petition, the opinion below is in direct conflict with the Fourth Circuit's 1992 decision in *Columbus-America*. That case arrived at the Fourth

Circuit after the District Court for the Eastern District of Virginia had an opportunity to consider the competing claims of Columbus-America and 39 insurance companies that intervened to assert that they or their predecessors-in-interest had insured some of the gold aboard the SS *Central America* when it sank. *Columbus-America*, 974 F.2d at 455. The district court concluded that the shipwreck was abandoned because it could be inferred from the passage of time, the claimants' inaction, and all of the other relevant facts and circumstances that the insurance companies had abandoned any interest that they may have had in part of the steamship's cargo. *Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1343-1348 (E.D. Va. 1990). The district court further found that much uninsured cargo was aboard the vessel and there was no evidence that the gold recovered by Columbus-America was part of the insured cargo. *Id.* at 1347.

In a split 2-1 decision, the Fourth Circuit reversed, holding that although the hull and the passenger gold and effects on the ship were admittedly abandoned, the remainder of the cargo claimed by the insurance companies could not be considered abandoned unless Columbus-America proved by "clear and convincing evidence" that the insurance claimants had made an "express" abandonment.[1] *Columbus-America*, 974 F.2d at

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[1] As noted above and in the *amici curiae* brief of the National Trust for Historic Preservation, *et al.*, the Ninth Circuit rejected the Fourth Circuit's approach, observing that the Fourth Circuit's requirement of "an express renunciation of ownership" to prove abandonment was "a significant modification [in] maritime law." Pet. App. A15. The court below relied instead on the longstanding maritime law definition of abandonment, which it summarized as

(continued...)

[1](...continued)
follows:

> Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title."

Id. at A15 (citation omitted).

Just three months ago, the Sixth Circuit underscored the circuit split on the definition of abandonment when it specifically noted that it would "follow the lead of *Brother Jonathan* rather than that of *Columbus-America*." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997). In a diplomatic effort to avoid a head-on challenge to the Fourth Circuit's decision in *Columbus-America*, the Sixth Circuit stated that it did not need to directly reject that decision because it did not involve the A.S.A, but "simply note[d] that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances." *Id.* The Sixth Circuit reached this decision because, as it commented, "[c]ommon sense makes readily apparent that the [A.S.A.] did not contemplate a court's requiring express abandonment: such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." *Id.*

Despite the Sixth Circuit's efforts to avoid explicitly criticizing the Fourth Circuit, the Sixth and Ninth Circuits' recent decisions create an unavoidable conflict with the Fourth Circuit's 1992 decision in *Columbus-America* because the A.S.A. adopted the maritime law definition of abandonment by reference. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. Although the Fourth Circuit's decision is also inconsistent with a long line of pre-A.S.A. authority that the abandonment of sunken merchant vessels may be inferred, *see Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, (continued...)

461, 464, 468. Because Columbus-America could not show that the insurance claimants had signed a formal document or made a public announcement disclaiming any interest that they may have had in the gold, the court of appeals reversed the district court's inference of abandonment and remanded the case for a determination of what share of the treasure each insurer would get under the law of salvage. *Id.* at 464-65, 468. In remanding, the court of appeals instructed that the recovered gold would belong in the first instance to the insurance companies to the extent of any insured shipment (despite the district court's finding that there was no evidence that the recovered gold came from any insured shipment), thus erecting a legal presumption against the *in rem* plaintiff that recovered items do not belong to the plaintiff. *Id.* at 468.

Judge Widener dissented, criticizing the majority for "its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long-lost wreck; [and] in making factual findings as an appellate court." *Id.* at 471 (Widener, J., dissenting). The dissent noted that the majority opinion's requirement of an "express abandonment" "c[ould] not be reconciled" with "the law of every other circuit that has decided the question." *Id.* at

[1](...continued)
1064-65 (1st Cir. 1987); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985), it has not only been cited, but also adopted. *See Marex International v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) ("The law of salvage applies to shipwrecks that have not been expressly abandoned by their owners.") The circuit case law in this area is thus confusing and inconsistent, requiring resolution by the Court.

477.

The Fourth Circuit split 7-5 in denying rehearing and rehearing *in banc*.[2] Prior to a final judgment in the remanded proceedings, Columbus-America petitioned for certiorari on an interlocutory basis, but its petition was denied. *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 507 U.S. 1000 (1993).

In another case, which is also currently pending before the Court on a petition for a writ of certiorari, the Fourth Circuit applied its automatic presumption against unity of interests to divide the historic shipwreck *RMS Lusitania* into "owned" hull, tackle, apparel, appurtenances, etc. on the one hand, and "abandoned" cargo and passenger effects on the other hand. *Bemis v. The RMS Lusitania*, 1996 U.S. App. LEXIS 24373 at *1, *6-8 (4th Cir. Sept. 17, 1996), *petition for cert. docketed*, (March 14, 1997) (No. 96-1448). In that case, the Fourth Circuit applied its presumption against unity to deny rights to the *in rem* plaintiff, though no claim of superior title to the cargo and passenger effects had been filed by anyone in the entire world. *Id.* at *7-8.

Thus, any recoveries by an explorer/*in rem* plaintiff are presumed by the Fourth Circuit to be owned by someone else. Accordingly, the explorer has the virtually impossible burden of proving a negative -- *i.e.*, that every recovered item is not owned by an intervening claimant -- with the result that a presumption of validity is accorded to the claim of intervenors to items salvaged from an

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[2] Judge Hall, who had joined in the majority opinion, voted against a rehearing before the panel, but for consideration of the case by the full court *in banc*.

admittedly abandoned shipwreck.

One of the many practical results of the Fourth Circuit's decision in *Columbus-America* is that, with respect to abandoned shipwrecks, once it has been shown that a vessel itself belongs to the explorer/plaintiff, the plaintiff still has the "continuing" additional burden of proof. The plaintiff must show the abandonment of *each and every item* recovered from the admittedly abandoned vessel by clear and convincing evidence of an express disclaimer of title.

In contrast to the presumption against unity of interests applied in the Fourth Circuit, the rule in the Ninth Circuit presumes the unity of property interests in the defendant *res* absent proof to the contrary, placing the burden of pleading and proof on a claimant to come forward and demonstrate a disunity of interests. The Ninth Circuit's rule is thus the logical extension of the Court's analysis of the *in rem* presumption in *The Mary*, 13 U.S. (9 Cranch) 126 (1815). There, despite the overwhelming evidence to the contrary, the Court held that because no opposing claim to the vessel had been filed in the *in rem* proceeding, the district court had no choice but to enter judgment for the plaintiff as a matter of law:

> The whole subject formed but one cause, and the whole came together before the same judge. By the rules of the Court, the condemnation of the vessel was inevitable; not because she was British property, but because the fact was charged and not repelled by the owner, he having failed to appear and to put in his claim.

Id. at 142-43.

The Ninth Circuit's application of the presumption of a unity of interests in the defendant *res* follows from the intrinsic character of *in rem* actions, which are designed to adjudicate rights in specific property as against the world, and the whole world, it is said, is a party to an admiralty cause. *See Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303, 306 (1915). The core issue in such proceedings is whether the plaintiff, or instead someone else, has rights superior to the rest of the world.

For this reason, a plaintiff files an *in rem* proceeding in order to force any entity claiming superior title or conflicting rights to make its claims known in the proceeding, so the plaintiff will have an opportunity to confront and cross-examine the claimant. An *in rem* proceeding is a concursus, requiring that everyone claiming an interest in the *res* appear and either (i) assert its claim or (ii) defend against the claim of the plaintiff. *See* Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The purpose of *in rem* proceedings is thus to make a final determination regarding all competing claims in the *res*, and "'all persons, including unknown claimants, may appear and be heard....'" Advisory Committee Note on Supplemental Rule C(4), Fed. R. Civ. P.

In short, the "express abandonment" theory fails to address admiralty's "personification" of a vessel and its "unitary approach" to shipwrecks, which, before the Fourth Circuit's split decision in *Columbus-America*, treated a shipwreck site and its components as a legally unified *res* absent proof to the contrary.

B. This is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Presumptions Applicable to Property Interests in Admiralty Proceedings *In Rem*.

This case provides an appropriate vehicle for the Court to provide guidelines on the admiralty law applicable to the *in rem* presumptions discussed above. The conflict among the circuits is plain, and it has been openly acknowledged by the Sixth and Ninth Circuits.

The issues presented by this aspect of the petition are purely legal. The facts are not complex, and the outcome of the opinion below turns on the very question as to which a conflict exists.

Only this Court is capable of resolving the circuit conflict on this issue. This is consistent with the Court's constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970)). That uniformity is threatened by the conflict created by the opinion below. A conflict among the admiralty courts is even more intolerable in the context of shipwreck recovery, where venue is proper in any district where the recovered property may be brought upon recovery, giving every incentive for forum shopping. *See* 28 U.S.C. § 1333 (1996); *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981). The Court should grant certiorari to resolve the conflict and provide guidance to the lower courts.

II. NEW ADVANCES IN MARINE TECHNOLOGY HAVE MULTIPLIED CONFLICTS OVER PROPERTY INTERESTS IN *IN REM* PROCEEDINGS, REQUIRING THIS COURT'S EXERCISE OF ITS CONSTITUTIONAL ROLE IN FASHIONING THE DEVELOPMENT OF MARITIME AND INTERNATIONAL LAW.

The Court's resolution of conflicts is especially important in admiralty matters. The issue raised here "is one of importance in the development of the law maritime, as to which [the Supreme Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

The divergence in the approaches of maritime courts to adjudicating claims in *in rem* proceedings is plain. *Compare* Pet. App. A1 (treating defendant *res* as a unified whole) with *Columbus-America*, 974 F.2d at 465 (dividing up property interests in defendant *res*). *See* T. Schoenbaum, *Admiralty and Maritime Law* 513 (1987) (noting that "cases are in conflict on several points" in approaching long-lost wrecks); Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J. Dec. 4, 1992, at 3, 4, (discussing change in law effected by Fourth Circuit and concluding that there is a need for resolution by the Court of "[w]hat proof is needed to show presumptions regarding property interests").

The development of new maritime technology has made a conflict among admiralty law doctrines inevitable. Moreover, with the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of presumptions

regarding property interests an issue of growing significance.

Although the Federal Government's public policy strongly encourages deep-sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technology, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in such exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation -- Background Paper*, OTA-BP-E-37, 8 (1987).

With the presumption of unity of title, the risks noted above are balanced against the certainty and predictability that title will vest in an explorer who succeeds in locating and possessing ancient artifacts on the seabed. The opposite rule, however, provides an open invitation to highly speculative and fabricated claims. Under that rule, only after incurring the expense of bringing articles to the surface will deep-sea explorers know how much risk, including the risk of an adverse claim to title, is involved. That risk is particularly acute as to historic shipwrecks, where much time between the loss and the recovery has often passed and substantial sums may be at stake. For this reason, the lack of certainty and predictability created by the conflict among the circuits provides maritime explorers and entrepreneurs with an unfortunate disincentive to invest sufficient resources in deep-sea recovery projects.

III. ABSENT RESOLUTION BY THIS COURT, THE CONFLICT AMONG THE FEDERAL CIRCUITS WILL CONTINUE TO SPAWN CONFUSION IN FEDERAL-STATE JURISDICTION, IN THE LAW GOVERNING THE PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS, AND IN ADMIRALTY PRACTICE AND PROCEDURE FOR ADJUDICATING *IN REM* PROCEEDINGS.

The uncertainty over the maritime presumptions regarding property interests that arises from the conflict among the federal circuits has important implications for the law governing the management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in 1988* U.S.C.C.A.N. 365. Congress and the States have accordingly passed legislation aimed at protecting these historic resources. The federal-state jurisdictional conflict that inherently results from the rule applied in the Fourth Circuit, however, places the practicable administration of such legislation in doubt and makes conflicts of jurisdiction inevitable between federal and state courts.

The major federal statute on point is the A.S.A. Under the A.S.A., the United States asserts title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, but transfers title of most such shipwrecks to the State on whose submerged land they are located. 43 U.S.C. § 2105. States are encouraged under the A.S.A. to take steps to protect abandoned shipwrecks for recreational and historical purposes. *Id.* at § 2104.

Under the rule in the Fourth Circuit, there is no presumption of unitary property interests in such shipwrecks. Instead, shipwrecks are automatically presumed to be divided into "abandoned" and "unabandoned" portions, and items recovered from shipwrecks are presumed to be the property of anyone that appears to assert a claim against the explorers who have found the shipwrecks.

In rejecting the Fourth Circuit's rule, the Ninth Circuit has observed the clash of federal-state jurisdiction inherent in the Fourth Circuit's approach:

> [I]f we were to find that the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the *Brother Jonathan*. It is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA.

Pet. App. A18.

The conflict among the circuits over the proper presumption in *in rem* proceedings thus has important implications for the laws governing the management of maritime resources by the Federal Government and the States. This split among the circuits also has significant implications for the distribution of jurisdiction between state and federal courts, as well as the future ability of non-governmental institutions to participate in the benefits and innovations of high-tech exploration of the deep ocean.

The Ninth Circuit apparently rested its approach on its concern that the Fourth Circuit's approach would

burden admiralty courts with the difficult task of dividing up historic shipwrecks based on claims given ageless vitality by the presumptions against the unity of property interests in the defendant *res*. The Court's attention to the issue is warranted now to avoid further confusion in this area.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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